No. 89-636

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

JOHN P. BARRETT d/b/a
BARRETT OUTDOOR COMMUNICATIONS,
Petitioner,

v.

J. WILLIAM BURNS,
COMMISSIONER OF TRANSPORTATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

Attorneys For Respondent:
CLARINE NARDI RIDDLE
ATTORNEY GENERAL
KATHRYN MOBLEY
Assistant Attorney General
BRADFORD C. MANK
Assistant Attorney General
MICHAEL J. LOMBARDO
Assistant Attorney General
Counsel of Record
P.O. Box 120
55 Elm Street
Hartford, CT 06106
(203) 566-2257

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 89-636

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

JOHN P. BARRETT d/b/a
BARRETT OUTDOOR COMMUNICATIONS,
Petitioner,

v.

J. WILLIAM BURNS,
COMMISSIONER OF TRANSPORTATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

The respondent, J. William Burns, Commissioner of Transportation for the State of Connecticut, prays that a writ of certiorari, as requested by the petitioner, John P. Barrett d/b/a Barrett Outdoor Communications, not be issued to review the judgment of the Connecticut Supreme Court rendered on July 18, 1989.

STATEMENT OF THE CASE

In this case, the Connecticut Supreme Court upheld the decision of the Connecticut Superior Court ordering the removal of three outdoor advertising sign faces and supporting structures at two locations owned by the petitioner in East Haven, Connecticut pursuant to Connecticut Department of Transportation ("ConnDOT") Regulation § 13a-123-5(b), which prohibits, except in certain narrowly defined circumstances, the placement of such signs within 500 feet of an interstate highway interchange. *J. William Burns, Commissioner of Transportation v. John P. Barrett*, 212 Conn. 176, 561 A.2d 1378 (1989). The Connecticut Supreme Court held that this regulation was narrowly drawn to serve the State's interest in highway safety, and, therefore, did not violate the First Amendment to the United States Constitution. *Id.* In addition, the Connecticut Supreme Court held that the regulation was content-neutral, and, accordingly, did not violate the First Amendment to the United States Constitution. *Id.* As to the facts of this case, respondent refers this Court to the text of the Connecticut Supreme Court's decision. *Id.*

The respondent takes strong exception to the petitioner's assertion at page 15 of its Brief that the regulation in question regulates only signs and not the structure holding one or more signs. The petitioner states at page 15 of its Brief:

> In fact, the respondent, in effect, admitted that safety is not an issue in this case. At the hearing, the respondent conceded that the structures are legal and that the respondent is not attempting to regulate the structures or to have them taken down. (8/29/86 transcript at 142; 2/19/87 transcript at 30–31). The petitioner therefore could conceivably leave an empty structure in place, or even use it for a party, as the petitioner facetiously suggested at the hearing. The respondent conceded that it would not have any authority to prohibit such a use or to have the structure removed as long as the petitioner did not place a

> sign on the structure. In making these concessions, the respondent effectively admitted that enforcement of the regulations in question in these instances would not further its interest in safety. The respondent cannot reasonably argue that the structures would be more of a distraction with signs than without signs. Mr. Gubala, the state's safety expert, in fact, admitted that a structure without a sign could be an even greater distraction and safety hazard to drivers than it would be with a sign. (2/20/87 transcript at 28–29). In light of these concessions by the respondent, the Connecticut Supreme Court's ruling that the statute was narrowly drawn to meet safety interests is clearly erroneous.

Petitioner's Brief at page 15.

Petitioner raised the same claim before the Connecticut Superior Court in its Request for Clarification dated August 16, 1988, of the meaning of the word "sign," that is, does the word "sign" include the structure supporting the message? (See Connecticut Supreme Court Record ("R") at 36–46). The Superior Court, after reviewing the pleadings, the statutes and the regulations defining "sign" stated:

> Although at one point in the trial the Assistant Attorney General waffled on whether she sought removal of the message on the billboards or the billboards themselves, the entire evidence supported the conclusion that the billboard structures diminished highway safety and aesthetics. Thus, this Court intended its order to require removal of the *sign structure* at 38 Bradley Street, East Haven. (Emphasis in original).

(R at 58). Additionally, the testimony of the State's witness was that the permit was for the structure. (Tr. 8-29-86, p. 138; R at 51). Furthermore, earlier in the colloquy between the trial court and the State's counsel where the Assistant Attorney

General "waffled," counsel stated that the structure was subject to the regulations. (Tr. 2-19-87, pp. 26–31 (Appendix to Respondent's Brief in the Connecticut Supreme Court ("PA") at 67–72)). Respondent's witness and respondent counsel also made it clear that the sign clearly included the supporting structure for the message. (Tr. 2-18-87, pp. 148–154 (PA at 44–50)).

The petitioner in its Brief at page 20 erroneously contends that Connecticut statutes and regulations permit on-site commercial signs, but do not allow on-site non-commercial signs. The petitioner in its Brief at page 20 states:

> The regulations and statutes in issue here create such a "peculiar inversion" for they too permit commercial speech where non-commercial messages are not allowed. For example, C.G.S. § 13a-123(e) and Conn. Agencies Regs. § 13a-123-7 exempt on-site commercial signs from the prohibition against signs within 500 feet of another sign or an exit ramp. A non-commercial sign, however, is not permitted in these areas for there is no similar exemption for non-commercial signs. Such a statute is obviously contrary to the holding of Metromedia and its progeny for it impermissibly distinguishes between two different types of speech based on content and favors commercial speech over non-commercial speech. See *Matthews,* 764 F.2d at 60 (ordinance distinguishing between commercial and non-commercial speech impermissibly distinguishes on basis of content). This statutory scheme is unconstitutional on its face in that it prevents the defendant from displaying political and ideological messages which it has traditionally conveyed while allowing signs for commercial goods and services. *Id.* at 61 (ordinance favoring commercial over non-commercial speech unconstitutional on its face).

Petitioner's Brief at Page 20.

The Connecticut Supreme Court, however, expressly stated that Connecticut regulations and statutes permit on-site non-commercial signs:

> This court on several occasions has observed that any governmental regulation affecting speech must be content-neutral. *French v. Amalgamated Local Union 376,* 203 Conn. 624, 633, 526 A.2d 861 (1987); *Husti v. Zuckerman Property Enterprises, Ltd.,* 199 Conn. 575, 581, 508 A.2d 735, appeal dismissed, 479 U.S. 802, 107 S.Ct. 43, 93 L.Ed.2d 373 (1986); *Friedson v. Westport,* 181 Conn. 230, 236, 435 A.2d 17 (1980). The defendant claims that the exception for on-premises signs made by the statute and regulation is equivalent to a preference for commercial signs, because "there is no similar exemption for noncommercial signs." He apparently assumes that no noncommercial signs can be permitted near highway interchanges under the requirement of the regulation that on-premises signs "advertise . . . activities being conducted upon, the real property where the signs are located." We construe the regulation, however, to include in the exception for on-premises signs those relating to noncommercial as well as commercial activities located on the premises, such as those of a hospital, church, club, political organization or other noncommercial institution. For example, if some organization of veterans were located on the premises where the defendant has placed his sign concerning Vietnam veterans, the requisite relationship between the sign and activities conducted on the premises would exist. Such a noncommercial message could also be sponsored by a business conducted on the site of the sign for the purpose of advertising the business, since many advertisements contain statements of public interest not directly related to the wares sold by the sponsor but intended to attract attention or create good will for its benefit. The exception for on-premises signs, therefore, does not authorize the state

> to limit in any manner the content of signs erected by those conducting activities on the premises so long as the signs have some reasonable relationship to those activities.
>
> . . .
>
> Our interpretation of the on-site exception in this case, however, does not create any preference for commercial messages. Anyone conducting any activity on property where a sign is to be erected may display either commercial or noncommercial advertisements that have some reasonable relationship to an activity conducted thereon. We need not explore the extremes to which advertising signs must go before they can be deemed not to relate to activities being conducted on the premises, because in this case the defendant does not claim that any activity is being carried on at the location of the Vietnam veterans sign.

Burns v. Barrett, supra, 212 Conn. at 188–190, 561 A.2d at 1384–1385.

It is important to observe that there is no conflict among the federal or state courts regarding the type of statutes and regulations at issue in the case. In the only two cases involving regulations or statutes similar to those at issue in Connecticut, the courts upheld their validity against constitutional challenge. *Wheeler v. Commissioner of Highways,* 822 F.2d 586 (6th Cir. 1987), *cert. denied,* ____ U.S. ____, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988); and *State v. Lotze,* 92 Wash.2d 52, 593 P.2d 811, *appeal dismissed,* 444 U.S. 921, 100 S.Ct. 257, 62 L.Ed.2d 177 (1979). Accordingly, the Petition for a Writ of Certiorari should be denied.

REASONS FOR NOT GRANTING THE WRIT

I. THE CONNECTICUT SUPREME COURT DID NOT ERR IN CONCLUDING THAT THE STATUTES AND REGULATIONS IN ISSUE ARE NARROWLY DRAWN TO SERVE A SIGNIFICANT GOVERNMENTAL PURPOSE AND DO NOT VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is noteworthy that the petitioner does not claim that there is a conflict among the Circuit Courts of Appeal regarding the issues in this case, or that there are any new constitutional issues raised here. In essence, the petitioner is arguing that there were insufficient facts to support the conclusion of the Connecticut Supreme Court that a ConnDOT regulation prohibiting signs *and* structures within 500 feet of highway interchanges was narrowly tailored to achieve the important governmental goal of promoting highway safety. (*See* Petitioner's Brief at pages 11–17). This Court does not ordinarily grant a writ of certiorari to review possible factual errors. Supreme Court Rule 17.1 sets forth the considerations governing review on certiorari:

> Rule 17. Considerations governing review on certiorari
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from

the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

None of the considerations listed in Supreme Court Rule 17 are present in this case.

In any case, there was substantial evidence supporting the Connecticut Supreme Court's holding that the statutes and regulations in issue are narrowly drawn to serve the State's significant governmental interest in promoting highway safety. As is discussed in the Statement of the Case, the petitioner's contention that safety was not an issue in the case because the regulation applied only to the sign itself and not the structure holding the sign is totally false. (*See* Petitioner's Brief at page 15). The Superior Court "intended its order to require removal of the *sign structure* at 38 Bradley Street, East Haven." (Emphasis in original). (R at 58). Furthermore, the respondent presented evidence and the Superior Court concluded that "the evidence was that on-site advertising within interchanges, while distracting, was less so and less of a traffic hazard than off-site advertising." (R at 26–27).

The Connecticut Supreme Court presented substantial reasons justifying its conclusion that the regulation promoted highway safety and was narrowly drawn to achieve that purpose:

The defendant maintains that the regulations fail to serve a significant state interest and to advance that interest directly, as the second and third criteria require. The trial court found, however, that "there was substantial evidence that commercial signs at highway interchange areas contribute to accidents." The chief transportation engineer of the department of transportation had testified: " '[I]n interchange areas, especially major highways of this type, the decision-making is very intense at this point. A driver must make up his mind . . . whether [he is] going to exit at that point or . . . going to go forward to a further destination. They have to be concerned abut the driver [who] does want to exit but is in the wrong lane and may dart across their path. There are intense areas. Those are the areas that have the greatest amount of accidents on expressways. Therefore, the regulation asking that the signs not be erected within five hundred feet of these on and off ramps is designed to clear the boards . . . and leave that area as open as possible for intelligent decision-making by the driver. . . .' " This testimony plainly supports the court's finding.

Many courts have concluded that a governmental judgment that highway billboards are traffic hazards is not manifestly unreasonable and should not be set aside. See *E.B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1142, 1152 (5th Cir. 1970); *Inhabitants, Town of Boothbay v. National Advertising Co.*, 347 A.2d 419, 422 (Me. 1975); *General Outdoor Advertising Co. v. Department of Public Works*, 289 Mass. 149, 180–81, 193 N.E. 799 (1935); *In re Opinion of the Justices*, 103 N.H. 269, 270, 169 A.2d 762 (1961); *Stuckey's Stores, Inc. v. O'Cheskey*, 93 N.M. 312, 321, 600 P.2d 259 (1979); *New York State Thruway Authority v. Asley Motor Court, Inc.*, 10 N.Y.2d 151, 155–56, 219 N.Y.S.2d 640, 176 N.E.2d 566 (1961); *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741,

757 (N.D. 1978); *Ghaster Properties, Inc. v. Preston*, 176 Ohio St. 425, 438, 200 N.E.2d 328 (1964); *Lubbock Poster Co. v. Lubbock*, 569 S.W.2d 935, 939 (Tex.Civ.App. 1978); *State v. Lotze*, 92 Wash.2d 52, 59, 593 P.2d 811, appeal dismissed, 444 U.S. 921, 100 S.Ct. 257, 62 L.Ed.2d 177 (1979); *Markham Advertising Co. v. Washington*, 73 Wash.2d 405, 420–21, 439 P.2d 248 (1968); but see *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 11, (1st Cir. 1980); *Metromedia, Inc. v. Des Plaines*, 26 Ill. App.3d 942, 946, 326 N.E.2d 59 (1975); *State ex rel. Dept. of Transportation v. Pile*, 603 P.2d 337, 343 (Okla. 1979). Even at a time when motor vehicles moved more slowly, this court observed that "[highway billboards] may obstruct the view of operators of automobiles on the highway and may distract their attention from their driving . . ." *Murphy, Inc. v. Westport*, 131 Conn. 292, 295, 40 A.2d 77 (1944). "We . . . hesitate to disagree with the accumulated, common-sense judgments of . . . lawmakers and of many reviewing courts that billboards are real and substantial hazards to traffic safety." *Metromedia, Inc. v. San Diego*, supra, 453 U.S. at 509, 101 S.Ct. at 2893; see *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949).

There can be little doubt that public safety on the highway is a substantial governmental interest. A regulation restricting the location of billboards designed to be seen by motorists travelling at high speeds on a highway such as I-95 by excluding such distractions from especially hazardous areas where vehicles enter or leave the highway may reasonably be viewed as implementing that interest and directly advancing it.

Burns v. Barrett, supra, 212 Conn. at 182–184, 561 A.2d at 1382.

In addition to concluding that the statutes and regulations in issue serve an important governmental purpose, traffic safety, the Connecticut Supreme Court also held that the statutes and regulations were narrowly drawn to serve that purpose:

> The trial court also found that the regulation satisfied the fourth *Metromedia, Inc.*, criterion, that the restriction reach "no further than necessary to accomplish the given objective"; *Metromedia, Inc. v. San Diego*, supra, 453 U.S. at 507, 101 S.Ct. at 2892; concluding that the regulation was "narrowly drawn" to achieve "the important objectives of traffic safety and esthetics. . . ." The defendant disputes this conclusion, contending that the restriction leaves open no alternative channels for communication with such a significant audience as the motoring public. He relies upon *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977), in which an ordinance prohibiting on-site "For sale" signs was invalidated because it eliminated a particularly effective medium of commercial speech, leaving only more expensive and less efficient media available. In the present case, however, the restriction cannot be characterized as a complete ban on a standard means of communication, such as outdoor advertising, or an insurmountable barrier to reaching motorists. It is applicable only to signs within 500 feet of interchanges, leaving the remainder of the highway available for outdoor advertising, unless some other regulation prohibits it. As we have previously noted, the regulation also exempts more populous municipalities from its operation. It applies only to "interstate highways, limited access federal-aid, primary highways." Regs., Conn. State agencies § 13a-123-1. The defendant is left free to erect outdoor advertising signs, even off-premises signs, along extensive stretches of our highway system. In true perspective, the restriction imposed by this regulation

> on the defendant's ability to communicate must be regarded as minimal. We agree with the trial court that it goes no further than necessary to achieve the important governmental purpose of reducing the risk of highway accidents at interchange areas. With respect to his commercial signs, therefore, the defendant has failed to demonstrate that the challenged regulation infringes upon his right of freedom of speech.

Burns v. Barrett, supra, 212 Conn. at 185-186, 561 A.2d at 1383.

Accordingly, there was substantial evidence supporting the Connecticut Supreme Court's holding that the statutes and regulations in issue are narrowly drawn to serve a significant governmental interest in highway safety and do not violate the First Amendment to the United States Constitution. Furthermore, as is clear from the decision of the Connecticut Supreme Court, its decision does not come within any of the categories set forth in Rule 17 to form the basis of granting of certiorari. Therefore, this Court should not grant a writ of certiorari in this case.

II. THE CONNECTICUT SUPREME COURT DID NOT ERR IN CONCLUDING THAT THE STATUTES AND REGULATIONS IN ISSUE ARE CONTENT-NEUTRAL AND DO NOT VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The petitioner's argument that the statutes and regulations in issue are not content-neutral rests on a distortion of the facts in this case. As was discussed in the Statement of the Case, the Connecticut Supreme Court expressly held that the on-site exemption applies to non-commercial speech as well as to commercial speech. Thus, the petitioner's contention at page 20 of its brief that "there is no similar exemption

for non-commercial signs" is squarely at odds with what the Connecticut Supreme Court held. The Connecticut Supreme Court clearly stated:

> We construe the regulation, however, to include in the exception for on-premises signs those relating to non-commercial as well as commercial activities located on the premises, such as those of a hospital, church, club, political organization or other noncommercial institution. For example, if some organization of veterans were located on the premises where the defendant has placed his sign concerning Vietnam veterans, the requisite relationship between the sign and activities conducted on the premises would exist. Such a noncommercial message could also be sponsored by a business conducted on the site of the sign for the purpose of advertising the business, since many advertisements contain statements of public interest not directly related to the wares sold by the sponsor but intended to attract attention or create good will for its benefit. The exception for on-premises signs, therefore, does not authorize the state to limit in any manner the content of signs erected by those conducting activities on the premises so long as the signs have some reasonable relationship to those activities.

Burns v. Barrett, supra, 212 Conn. at 189, 561 A.2d at 1385.

Furthermore, the Connecticut Supreme Court clearly explained that the statutes and regulations in issue do not create a preference for commercial speech over noncommercial speech.

> Our interpretation of the on-site exception in this case, however, does not create any preference for commercial messages. Anyone conducting any activity on property where a sign is to be erected may display either commercial or noncommercial advertisements

> that have some reasonable relationship to an activity conducted thereon. We need not explore the extremes to which advertising signs must go before they can be deemed not to relate to activities being conducted on the premises, because in this case the defendant does not claim that any activity is being carried on at the location of the Vietnam veterans sign.

Burns v. Barrett, supra, 212 Conn. at 190, 561 A.2d at 1385.

The petitioner also contends, "Non-commercial expression is entitled to more protection than commercial expression under the First Amendment and thus equal treatment of the two is constitutionally deficient." Petitioner's Brief at 21. However, all of the justices in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981) (plurality opinion) indicated that distinctions between on-site and off-site signs are permissible as long as they are neutrally applied. The plurality reaffirmed the Court's holding in *Suffolk Outdoor Advertising v. Hulse,* 439 U.S. 808 (1978) (dismissing appeal of 43 N.Y.2d 483, 373 N.E.2d 263 (1977)), that differing governmental interests implicated by the two types of signs justified differing treatment as long as the ordinance did not favor one type of speech over another based on its content. *See Metromedia, supra,* at 510–512. Justice Brennan's concurrence and Justice Stevens' dissent both viewed on-site and off-site signs as completely different media, and, therefore, found it unnecessary to consider the ordinance's impact on on-site signs. *See id.* at 526 n.5; *id.* at 532 n.9 (Brennan, J., concurring); *id.* at 542–548 (Steven, J., dissenting in part). The Chief Justice indicated that an exception allowing on-site commercial signs was permissible even if non-commercial signs were totally banned. *Id.* at 567–568 (Burger, Ch. J., dissenting).

The *Metromedia* court struck down the San Diego ordinance, however, due to several features that are not present in the Connecticut statutory scheme. To the plurality, one of the ordinance's chief flaws was that it excepted on-site advertising for "goods or services available on the property," but

provided "no similar exception for non-commercial speech." *Id.* at 503, 513. The plurality held that the ordinance thus violated the First Amendment by imposing greater restrictions on non-commercial signs than on commercial ones. *Id.*

In the case at bar, however, the Connecticut Supreme Court expressly held that the regulations and statutes at issue treat on-site non-commercial speech exactly the same as commercial speech, which distinguishes this case from *Metromedia*. *Burns v. Barrett, supra,* 212 Conn. at 188–190, 561 A.2d at 1384–85.

In addition, the plurality in *Metromedia* indicated that other distinctions in the San Diego ordinance, such as special provisions allowing political campaign signs but not permitting other sorts of ideological messages, represented an improper attempt to allow or disallow signs throughout the city based on their content. *Id.* at 514–515. These distinctions are not present in this case.

The Connecticut Supreme Court distinguished other cases cited by the petitioner:

> The defendant also relies upon *Adams Outdoor Advertising v. Newport News,* 236 Va. 370, 373 S.E.2d 917 (1988) in which a municipal ordinance banning off-premises signs, with specified exemptions, but permitting all on-premises signs bearing either commercial or noncommercial messages, was declared unconstitutional. The court, however, appears to have based its decision on the exemptions contained in the statute for various signs, depending upon their content, whether the signs were located on or off the premises, such as directional signs, civic or cultural event signs, and displays used for nonpartisan civic purposes or for opening a new store, business or profession. In *Metromedia, Inc.,* similar exceptions to the general prohibition against outdoor advertising signs were deemed to create a governmental prefer-

> ence for certain varieties of speech based upon content and to render the San Diego ordinance invalid. The defendant has not brought to our attention any exceptions in the regulations involved here that allow signs containing one kind of information but not another. The remaining case relied on by the defendant in which municipal ordinances were invalidated also involved exceptions, based on content, to a general prohibition against outdoor signs and not merely an exception for on-premises signs relating to activities conducted on the premises. *Matthews v. Needham*, 764 F.2d 58, 60 (1st Cir. 1985) ("[n]o political signs are allowed in any district in the Town of Needham; yet such signs as 'For Sale' signs, professional office signs, contractors' advertisements, and signs erected for charitable or religious causes are allowed in all districts.").

Burns v. Barrett, supra, 212 Conn. 190–191, 561 A.2d at 1385–1386.

Another case cited by the petitioner, *Van v. Travel Information Council*, 52 Or. App. 399, 628 P.2d 1217, 1224–27 (1981), is clearly distinguishable because the Oregon regulations broadly allowed on-site commercial signs but imposed narrow time limitations on the posting of non-commercial political signs whereas the Connecticut statutes and regulations in issue treat commercial and non-commercial speech exactly the same. The other case cited by the petitioner, *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 1334 (1987), stated that the distinction between off-site and on-site signs is valid under *Metromedia* if an ordinance "does not treat commercial speech more favorably." That case did not hold that non-commercial speech must be treated more favorably than commercial speech. *Id.*

The Connecticut Supreme Court observed that in the only two cases involving regulations or statutes similar to those at

issue in Connecticut, the courts upheld their validity against constitutional challenge:

> In *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), cert. denied. ____ U.S. ____, 108 S.Ct. 702, 98 L.Ed.2d 653, reh. denied, ____ U.S. ____, 108 S.Ct. 1127, 99 L.Ed.2d 287 (1988), the court upheld a regulation similar to our § 13a-123-7(2) that permitted on-premises signs "that contain a message relating to an activity or the sale of a product on the property on which they are located." 603 Ky.Admin.Regs. 3:010, § 2(3) (1975). The regulation was construed to permit both commercial and non-commercial signs in protected areas so long as the signs relate to activities on the premises. Accordingly, the regulation was deemed to "apply even handedly to commercial and noncommercial speech." *Wheeler v. Commissioner of Highways, supra*, at 590. The court relied in part upon *Heffron v. International Society for Krishna Consciousness, Inc.*, supra, where the United States Supreme Court had upheld a content-neutral prohibition on the sale, exhibition or distribution of materials at a state fair except from fixed locations. "Kentucky, by allowing persons who own or lease property, to have a sign, subject to size and space restrictions, advertising an activity conducted on the property is not favoring one message over another. The state has simply recognized that the right to advertise an activity conducted onsite is inherent in the ownership or lease of the property." *Wheeler v. Commissioner of Highways, supra*, 591; see *Lindmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93, 97 S.Ct. 1614, 1618, 52 L.Ed.2d 155 (1977) (suggesting that a prohibition against on-premises "For Sale" signs raises "serious questions . . . as to whether the ordinance 'leave[s] open ample alternative channels for communication.' " [quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48

> L.Ed.2d 346 (1976)]). The Supreme Court of Washington has reached a conclusion similar to that of *Wheeler,* upholding the allowance of on-premises signs advertising activity conducted on the property where the signs are located as an exception to a general prohibition against signs visible from certain highways. *State v. Lotze, supra* [92 Wash.2d 52, 593 P.2d 811, appeal dismissed, 444 U.S. 921, 100 S.Ct. 257, 62 L.Ed.2d 177 (1979)].

Burns v. Barrett, supra, 212 Conn. at 191–192, 561 A.2d at 1386.

Thus, the Connecticut Supreme Court held that the Conn. Statutes and Regulations were content-neutral and did not favor commercial over non-commercial speech.

Furthermore, there is no conflict among the federal court of appeals or state courts regarding the type of regulations and statutes at issue in this case, and, therefore, this Court should not grant certiorari. *See* Supreme Court Rule 17 (standard for granting certiorari).

The Connecticut Supreme Court correctly held that the statutes and regulations in issue are content-neutral and do not violate the First Amendment to the United States Constitution. Accordingly, this Court should deny the petition for a writ of certiorari.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ATTORNEYS FOR RESPONDENT

CLARINE NARDI RIDDLE
ATTORNEY GENERAL

KATHRYN MOBLEY
Assistant Attorney General

BRADFORD C. MANK
Assistant Attorney General

MICHAEL J. LOMBARDO
Assistant Attorney General
Counsel of Record
P.O. Box 120
55 Elm Street
Hartford, CT 06106
(203) 566-2257